

Nonprofit Risk Managemer Center

29 C.F.R. § 1630.2(o)(1)(iii).

• EEOC regulations define the term reasonable accommodation to include "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."

onprofit III isk Management isk Management if the sense is the sense i

"requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective."

www.nonprofitrisk.org

Nonprofit Risk Management Center

Title VII: Sexual Harassment of Male Employees

EEOC v. Prospect Airport Services, 621 F.3d 991 (9th Cir. 2010)

- <u>Issue</u>: What must a plaintiff show to prove the "unwelcomeness" element of a hostile work environment harassment claim?
- <u>Held</u>: Employer potentially liable because male employee clearly communicated unwelcomeness
 "Welcomeness" inherently subjective; cannot assume
 - that men welcome sexual advances from women

www.nonprofitrisk.org

Risk Managemer

"Severe or Pervasive"

- Title VII is not a "general civility code." A violation is not established merely by evidence showing "sporadic use of abusive language, gender-related jokes, and occasional teasing." A violation is established when the unwelcome sexual conduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."
- Source: EEOC v Prospective Airport Services





Nonprofit III Risk Managemen

...And a Note About Volunteers

- FLSA only defines "volunteers" with respect to state or local government agencies
 - \succ Individual receive no (or nominal) compensation
 - \succ Services are not same as those for which individual is employed to perform
- State law may also offer insight on the definition of "volunteer." For example, in Washington State, volunteers:
 - > Give time freely and without anticipation of compensation;
 - > Are not paid for their services
 - May not be employed by the same agency or organization to perform the same or similar services.





Nonprofit III Risk Management Center

Risk Management Tips

- *Put it in writing* use position descriptions or Volunteer Agreements to clarify volunteer roles
- Document policies in separate manuals
- Never ignore "off the clock" service
- Never coerce employees to volunteer

Source: Risk Management Essentials

www.nonprofitrisk.org

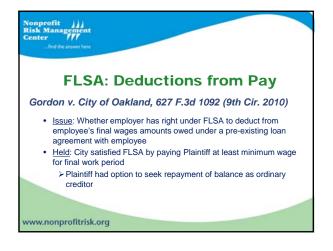
Nonprofit III Risk Management Center III

Computer Fraud and Abuse Act

United States v. Nosal, 642 F.3d 781 (9th Cir. 2011); LVRC Holdings, LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009)

Issue: Whether use of company computer system against employer interests violates CFAA?

- Held:
 - Nosal: Violation; employee was aware of computer use restrictions
 - Brekka: No violation; employer knew employee had competing business, did not require employee to sign agreements limiting access to/use of documents





- discrimination resets with each new discriminatory paycheckBack pay awards still limited to 2 years
- Protect yourself:
- Develop specific criteria for compensation decisions.
 Audit current pay documentation practices.

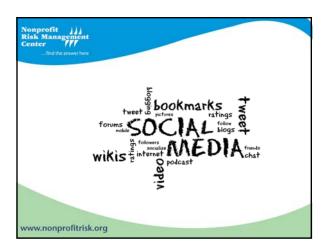
www.nonprofitrisk.org

Nonprofit Risk Management Center

Dodd-Frank Act

- Amended Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq.
- Any employer using credit score to make adverse decision must provide within 30 days:
 - > notice that a credit score was used;
 - > the actual credit score; and
 - \succ the identity of the agency that provided the score







Nonprofit Risk Managemen Center

...find the answer here

"Protected Concerted Activity"

Potentially Unlawful under the NLRA:

- Discharging five employees for responding to a coworker's Facebook posting
- Policy prohibiting staff from posting pictures of themselves with organization logos is overbroad because it can be interpreted to prohibit employees from posting pictures of themselves engaged in concerted protected activity, such as picketing or other protests against their employer.

www.nonprofitrisk.org



Nonprofit IIII in the second second

www.nonprofitrisk.org

Nonprofit III Risk Managemen Center III

Lawful under the NLRA

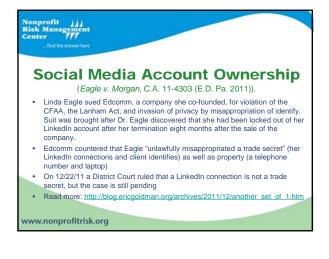
- □ Terminating a bartender who complained on Facebook to his stepsister, a non employee, that: he had not received a raise in five years, was doing "waitress" work without tips, the bar's customers were rednecks, and sharing his "hope" that customers would "choke on glass as they drove home drunk."
- Firing an employee who posted profane comments on Facebook critical of management. Posts were an expression of individual gripes as opposed to protected concerted activity. Although two co-workers responded to the posting, their messages reflected that the posting was individual and not group activity.

www.nonprofitrisk.org

Nonprofit Risk Managemer Center

"Protected Concerted Activity" and the NLRA

- Employees "griping, uniting, or discussing terms and conditions of employment = protected activity
- Firing employees engaged in protected activity is a violation of the NLRA
- NLRB v. White Oak Manor employee took photos of other employees wearing hats and violating company dress code. 4th Circuit ruled that termination violated employee's rights.



Nonprofit Risk Management Center

...find the answer here

Independent Contractor... or Employee?

- In a December 27, 2011 decision, the NLRB reversed a regional director's decision and found that musicians for orchestras in PA, MA and TX as employees, not ICs. Case sent back to region for further action.
- · Factors weighing in favor of employee status:
 - Once selected to work, control over work time ends; musicians subject to set work hours, payment schedules, dress codes, standards of behavior.
 - No "entrepreneurial opportunity or risk" because fees are set.







www.nonprofitrisk.org

Risk Managemen

FLSA: Work Breaks for Nursing Mothers 29 U.S.C. §207(r)

- Provides additional protections for non-exempt employees who are nursing mothers
- Reasonable break time to express breast milk for up to one year
- Place shielded from view and free from intrusion from co-workers and the public
- Employer with < 50 employees exempt *but only if* compliance would impose undue hardship









Nonprofit III Risk Management Center III

Fair Credit Reporting Act

New guidance from the FTC clarifies the applicability of Fair Credit Reporting Act protection to volunteers. "Staff report with summary of interpretations" issued in July 2011 indicates that "volunteers" should be treated as employees with respect to the applicability of the FCRA. The report notes that "Because the term 'employment purposes' is interpreted liberally to effectuate the broad remedial purpose of the FCRA, it may apply to situations where an entity uses individuals who are not technically employees to perform duties... [including] a nonprofit organization staffed in whole or in part by volunteers."

www.nonprofitrisk.org

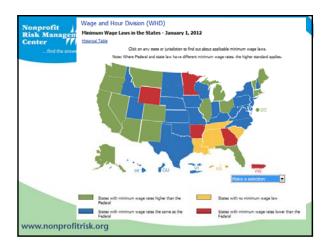
Nonprofit Risk Managemer Center

Misclassification Initiative

- DOL and IRS join forces
- Eleven states have signed agreements with the Wage and Hour Division of DOL
 - To enable sharing of information and coordination of enforcement activity











www.dol.gov/whd/state/state.htm

